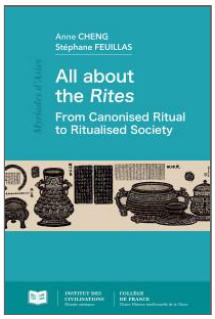

Under the direction of Anne Cheng and Stéphane Feuillas

All about the *Rites*
From Canonised Ritual to Ritualised Society

Zheng Xuan's commentaries on law

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Zheng Xuan’s commentaries on law

Frédéric Constant

1 Zheng Xuan 鄭玄 (127–200) is usually portrayed as a Confucian scholar, mostly known for his prolific commentaries on the Classics, of which several were later selected as standard interpretations in official compendia.[1] Although he was not a professional jurist –he was neither appointed as a judge, nor commissioned to draft laws– he is nonetheless credited with having produced several treatises on law, of which unfortunately no copies have been preserved. In addition, Zheng Xuan’s commentaries on the Classics contain several references to Han law as well as refined definitions of important legal categories. Late Qing jurists, such as Shen Jiaben 沈家本 (1840–1913), sometimes depicted as the progenitor of Chinese legal history, often referred to Zheng Xuan’s works in their effort to study the evolution of Chinese law since the Han dynasty.[2]

2 However, given the fact that most of the legal documents written between the Han 漢 dynasty (206 BC–AD 220) and the Tang 唐 dynasty (618–907) are now lost, and that we merely have access to fragments of Zheng Xuan’s work on law, it is difficult to describe in detail the evolution of Chinese law during this period. Within the framework imposed by the limitations of the extant documentation, we are nonetheless able to identify some aspects of Zheng Xuan’s influence on the construction of Chinese codes.

3 More generally, several factors may explain the interactions between Confucian scholars’ interpretation of the Classics and the formation of Chinese imperial law as codified by each dynasty from the Three Kingdoms period onwards (220–280).[3] Scholars commenting the Classics often discussed political matters; some were in charge of codifying law. Meanwhile, jurists were educated in Confucian teachings. There was no separation between different domains of knowledge, and it was not unusual for a same person to comment on both the Classics and law, as did Zheng Xuan. Because they made use of the same interpretative methodology and references, the commentaries on the Classics permeated Chinese jurisprudence. Finally, since the Classics were used as guidelines to organise the government, their commentaries naturally became references for jurists writing legal documents.

4 In the first section of this paper, I will start by describing the interactions between canonisation of rituals and codification of law in China in order to shed a clearer light on the general context surrounding Zheng Xuan's commentaries. Then, in the following section, I will present an overview of Zheng Xuan's works that includes legal commentaries. Finally, I will discuss the extent to which they influenced the evolution of Chinese law, notably with regard to his understanding of legal categories and their posterity for later Chinese jurists.

From the canonisation of rituals to the codification of law

5 Canonisation of rituals and codification of law in China are two processes sharing similar features. They are entrenched in a common intellectual background and occurred within the same political context. From the Han Dynasty onwards, Chinese thinkers toiled hard to classify and systemise all accumulated knowledge. After Confucian thought had become the underlying basis of the Chinese imperial state, it was essential to determine its exact content. Chinese scholars achieved such a goal mainly through the selection of the texts composing the canons. And it is with the help of commentaries that they built an unequivocal interpretation. There were strong political implications behind the state-sponsored elaboration of the heterodox corpus of knowledge that scholars devised to provide intellectual foundations for the government and to legitimise the Han dynasty.[4] A similar pattern was thereafter adopted with regard to the codification of law. From the end of the Eastern Han (AD 25–220) period onwards until the beginning of the Tang dynasty, Chinese jurists progressively streamlined Chinese law through a process of codification, *viz.* the intellectual operation of creating a coherent body of law.[5] Chinese codes were not the mere compilation of extant laws but rather the systematisation of law in one single corpus –in this sense it could be compared to the codification of law that occurred in Modern Europe during the 18th and 19th centuries. Archaeological materials excavated during these last four decades show that laws in effect during the Qin 秦 (221-206 BC) and the early Han periods were not organised in codes.[6] The first extant code was promulgated at the beginning of the Tang dynasty, but historical sources written during the Chinese Medieval period strongly suggest that the idea of codification first arose at the end of the Han dynasty.[7]

6 The influence of the canonisation of rituals on the codification of law was twofold. Firstly, the intellectual process of the harmonisation of several corpora of rules was basically the same for both the ritual and the legal spheres. Chinese scholars culled rules and rewrote them as needed in order to guarantee the coherence of the corpus as a whole. They also standardised interpretations, clarifying and unifying the understandings of specific terms. The codification of law took place in China in a context propitious to the clarification of existing knowledge. Secondly, Chinese jurists benefited from the existence of a canonical system of thought that structured the state organisation and its ideology. In determining the principles that underpinned the new codes, they took the Classics as a major reference. While the expression "Confucianisation of law" is rightly contested by scholars working in the context of the transition between the Qin and the Han dynasties, it describes rather well the process of reformulating legal norms to frame them into a comprehensive system of

government.[8] Confucianisation should be understood here as the reformulation of legal rules according to the newly established corpus of Confucian canons. These texts served as blueprints for the implementation of an ideal government, of which law was an important component. Such an understanding took place in a general context of research for the systematisation of the form of government already perceptible under the Qin dynasty.[9] It is thus worth noting that the term Confucian here refers to this ideological construct fashioned at the service of the Han government rather than to what would be the genuine thought of Confucius.

7 The overall process leading to the conformation of law to the Classics lasted several decades and can be divided into several stages. Many important Chinese scholars (of which Zheng Xuan is one of the most prominent) took part in this evolution. Before him, Dong Zhongshu 董仲舒 (179–104 BC) had already used the Classics to interpret laws when adjudicating cases for which strict compliance with the law would have led to unfair judgments.[10] Compared to Dong Zhongshu, Zheng Xuan's approach was more systematic: he did not ponder specific issues but rather discussed the legislation as a whole. Although Zheng Xuan is mostly known as a Confucian scholar who produced several important commentaries on the Classics, his areas of interest were not limited to ritual questions ***per se*** and he had great influence on several aspects of Chinese thought. After Zheng Xuan's death, during the Cao-Wei 曹魏 (220–265) and Jin 晉 (265–420) periods, several generations of jurists established the foundations for a body of knowledge specific to law. It became more independent from the hermeneutic of the Classics than it had been for Zheng Xuan. This "study of law" (*lüxue* 律學) was consecrated with the appointment during the Cao-Wei period of a Doctor of Law (*lü boshi* 律博士), who was in charge of research on legislation and of the diffusion of legal knowledge. With the development of jurisprudence, comprehensive studies of law were further developed, which led to the promulgation of systematic codes.[11]

8 Even though Zheng Xuan wrote commentaries on law, he should not be associated with *lüxue* in a narrow sense. Zheng Xuan and other Confucian scholars of his generation only laid the foundations for the development of Chinese jurisprudence. These two processes –the canonisation of the Classics and the Confucianisation of law– were often carried out by the same persons, who had recourse to a common methodology and pursued similar purposes. One example excerpted from the *Rites of Zhou* (*Zhouli* 周禮) can illustrate how law could have been adapted to conform to the Zhou institutions. The "plead for a trial" (*qiju* 乞鞫) was a form of judicial review which already existed in the state of Qin. Several provisions of the legislation promulgated at the beginning of the Han dynasty set up the legal framework of this procedure. At the beginning of the Han dynasty, a person convicted for a crime had one year to lodge an appeal.[12] The period was later reduced to three months, in compliance with the description of the office of the Audience Monitor, who was in charge of enforcing rules of conduct in audiences and whose decisions could no longer be subject to appeal three months after their being pronounced. Zheng Xuan quotes a commentary of Zheng Sinong 鄭司農 (?–83 AD) stating that the time limit to lodge a plead for a trial had accordingly been fixed to three months.[13]

9 In some ways, the Tang Code is the final outcome of the evolution Chinese law underwent from the Han dynasty onwards, a process during which Chinese jurists revamped legal institutions according to principles they found in the Classics. Although we cannot render the details of this long-term process, the comparison between Han

and Tang laws as well as commentaries recorded both in the Tang Code and in non-legal sources provide us information on the major influence exerted by the Classics on law. I will now briefly present several aspects of this influence, in order to illustrate the nature of the relation that existed between the two kinds of resources.

10 Firstly, the Tang Code with its commentaries (*Tang lü shuyi* 唐律疏議) contains many direct or implicit references to the Classics. These commentaries were originally designed to provide officials with clarification about the meaning of statutes, and to establish a standard interpretation for the degree in law of the imperial examination.[14] Commentaries are also very informative about the intellectual framework Chinese jurists had in mind when they drafted the code. The Classics were used to explain the law from several perspectives, such as relations between Heaven and man, the concept of punishment or fundamental social institutions.[15] The *Book of Rites* (*Liji* 禮記) and the *Book of Etiquette and Ceremonial* (*Yili* 儀禮), whose role was fundamental in the shaping of social and family rituals, are the most often quoted Classics in the Tang Code. Several rituals described in these two texts served to frame notions transversal to the code. The legal definition of kinship or matrimonial relationships, largely determined by ritual relations expounded in the Classics, had an influence on the code that went far beyond the specific issues they addressed. They were core concepts whose influence pervaded the entire code. They meanwhile illustrate how the Classics became the backbone of the Chinese legal system and the relations between codification and canonisation of Classics. The five degrees of mourning (*wufu* 五服) is certainly the most obvious exemplification of the interpenetration between rites and law.

11 For a large array of crimes, the offender's liability was quantified according to the nature of his relation to the victim. When they were parents, the responsibility was determined by the respective duty of mourning which bound them to each other. For instance, in the Tang Code, a person beating a relative of the same generation but older of the fifth degree of mourning is punished by one hundred blows of the heavy stick. The punishment respectively increases to one and two degrees for fourth- and third-degree mourning relatives, and to one additional degree for relatives of higher generation.[16] The degrees of mourning were also a common standard to mete out punishment for crimes such as illicit sexual relations, theft between relatives, or to determine conditions of mutual concealment between relatives. Chinese law is not the only legal system in which the quantum of the punishment varies when the offender and the victim are kin. The specificity of the Chinese legal tradition lies rather in the systematisation of those relations than in the mere correspondence between kinship and punishment.[17]

12 The outlines of funeral rituals and of the mourning system evolved between the Warring States period and the Han dynasty before being fixed in the *Book of Etiquette and Ceremonial*.[18] The canonical liturgy of family rituals was thereafter determined according to the texts arranged and annotated by Zheng Xuan.[19] Meanwhile, these duties pervaded the legal sphere and progressively became legal obligations. Even though the traditional historical sources record that the five degrees of mourning were adopted as legal standard under the Jin dynasty, this formalisation is the result of a process that had already started during the Han dynasty.[20]

13 The adoption of ritual categories in the code required several adaptations and clarifications with regard to the notion of kinship and the limit of its scope. The term "relatives" (*qinshu* 親屬) is defined in the Tang Code according to the *Book of Rites* and

Zheng Xuan's related commentary. Under three articles of the code, *qinshu* is described as encompassing persons within the fifth degree of mourning (*sima* 緦麻) on the paternal side, and those within the third degree of mourning by marriage (*dagong yishang hunyin* 大功以上婚姻).[21] This scope conforms to the delineation of kinship within the fifth degree of mourning as recorded in the *Book of Rites* (*sishi er si, fu zhi qiong ye* 四世而緦，服之窮也).[22] However, the comparison between the scope of each of the mourning degrees in the *Book of Etiquette and Ceremonial* and in the Tang Code shows several minor discrepancies, which reflect the work Tang jurists made to adapt ritual definitions when they established legal categories.[23] Despite a clear influence, the legal definitions of kinship were not the plain transposition of ritual categories.

14 Commentaries to the Classics were also used to address legal issues for which no clear answer was provided in the code. Given the complexity of the kinship pattern and all potential problems that concrete situations could give rise to, many questions remained unsolved in the code. One example related to kinship illustrates the kind of difficulties jurists could have to face and how they had recourse to the Classics to resolve them. Article 331 of the Tang Code specifies punishments when wives and their late husband's parents fight or curse each other. This article applies when the husband is dead and the wife has remarried, at the exclusion of situations in which a wife has been repudiated or divorced, for the relations between them are severed. When the bonds between the two families remain unharmed despite the death of the husband, the punishment therefore depends on the respective mourning duties between the offender and the victim. A commentary to this article discusses the hypothesis of a wife who does not remarry while her mother-in-law either is a young widow who had remarried or had been repudiated. By contrast to the general rule set out in article 331, the bond remains even when the separation is intentional and is not caused by the sole death of the husband.[24] The different understanding of the two situations is justified upon a commentary Zheng Xuan made to the *Book of Etiquette and Ceremonial* on the nature of the relation between a mother and her son. According to Zheng Xuan, "the way of the relation between a mother and her son can never be severed" (*muzi zhiqin wu juedao* 母子至親無絕道).[25] As a consequence, even though the mother-in-law had been repudiated, the bond remains with her son and his wife. The punishment is therefore decided according to their respective mourning duty and they are not considered ordinary persons when they fight each other.

15 Classics and their commentaries were an important resource Chinese jurists had recourse to in order to structure Chinese codes. The definition of kinship according to the Classics, which became a notion central to many legal institutions, exemplifies the interpenetration between ritual and legal orders, as well as the relations between canonisation and codification. After codes were promulgated, Classics remained the standard to assess situations ignored in the code.

Zheng Xuan's legal commentaries: an overview

16 According to Long Daxuan's recent research, 193 legal commentaries drafted by Zheng Xuan are still available today. They are for a great majority recorded in one of the three general commentaries on rites: the *Commentaries to the Etiquette and Ceremonial* (*Yili zhushu* 儀禮注疏), *Commentaries to the Book of Rites* (*Liji zhu* 禮記注) and *Commentaries to the Rites of Zhou* (*Zhouli zhu* 周禮注).[26] Most of the commentaries are found in the last of

these three books, which includes a chapter entitled *Office of Autumn* (*Qiuguan sikou* 秋官司寇) focusing on legal matters. However, Long Daxuan's enumeration encompasses texts of different natures, some of which, even though providing information on Han law, can hardly be considered genuine commentaries on law. As already mentioned, two kinds of Zheng Xuan's works include commentaries on law: treatises on law, of which a few fragments have been preserved, and commentaries on Classics. Only the first category directly purposed to address legal questions and can be considered legal commentaries in the strict sense of the term. The second category of texts comprises general commentaries –commonly on the Classics– , which may time to time refer to law. Although they were not commentaries on law *per se*, these texts reflect how Zheng Xuan interpreted law. I will successively present these two types of sources and discuss their utility to understand Zheng Xuan's contribution to the clarification of law.

17 According to the "Legal treatise" of the *Book of Jin* (晉書刑法志), Zheng Xuan, as well as other Han scholars such as Ma Rong 馬融 (79–166) or Ying Shao 應劭 (140–206), wrote "commentaries in chapters and verses on laws" (*lü zhang ju* 律章句).[27] These lengthy texts –often above a thousand words– which were dedicated to Han laws were inspired by the "commentaries in chapters and verses" (*zhangju* 章句) that became the main technique for exegesis of Confucian texts under the Han. This method is similar to a systematic gloss of important words followed by a more or less elegant paraphrase of the text in order to explain each term in the general context of the paragraph. These works were then overloaded and were criticised for focusing only on details and unable to capture the substance of the text studied. The genre evolved in the 2nd century A.D., especially under the influence of commentary by annotation (*zhu* 注): the commentaries became more condensed and focused on their subject. Most of the remaining commentaries date from the latter period, so that we often have only an incomplete picture of the commentaries in chapters and verses. Following this method, Han jurists glossed a large array of norms, including statutes (*lü* 律), ordinances (*ling* 令) and regulations (*ke* 科). Most of these commentaries were likely to be based on the Classics, with authors citing the Classics to interpret law (*yin jing zhu lü* 引經注律), according to an expression commonly used in modern scholarship. Today, these commentaries are almost completely lost; only a few fragments have been preserved in scattered documents.

18 Cheng Shude 程樹德 (1877–1944), a thinker and a legal historian of the early republican era, wrote a legal treatise in which he collected information on Han law available in historical sources. In an appendix to the section on "specialists on law" (*lüjia* 律家), he mentioned eight "explanations on law" (*lü shuo* 律說), which he considered to be the only remnants of commentaries in chapters and verses.[28] Among these documents, one can be attributed to Zheng Xuan with certainty. Yan Shigu 顏師古 (581–645) quotes an extract of a Zheng Xuan commentary to gloss a term in the *Book of the Han* (*Han shu* 漢書). The Tang scholar did not have direct access to Zheng Xuan's work, but he excerpted a quotation from Zhang Yan's 張晏 own comment on the *Book of the Han*:[29]

> 『設附益之法』注引張晏曰：『律鄭氏說，封諸侯過限日附益．或日阿媚王侯，有重法也．』
> "Establishment of the law on increased profits" according to Zhang Yan's explanation as quoted: "Mr Zheng said, when the regional lords overstep the limits, it is called 'increasing profits,' or flattering the high nobility. It is suppressed by severe punishments."[30]

19 Promulgated under the reign of emperor Wu 武 of the Han dynasty (r. 141–87 BC), this law targeted the members of the imperial family who had been granted the title and benefits of regional lords at the beginning of the dynasty, and whose power was threatening the constitution of a centralised empire. The existence of specific laws dedicated to the regional lords is confirmed in both historical and archaeological sources, which suggests the genuineness of information recorded in the *Book of the Han*. [31] The law on increased profits attempted to sever relations between officials at the court and regional lords in order to diminish the princes' authority. It is likely that Zhang Yan quoted an actual legal commentary Zheng Xuan wrote on law. According to Yan Shigu, the expression *fuyi* (附益) derives from a quotation of the *Analects*: "Qiu collected imposts for him [the head of the Ji family], and increased his wealth" (求也爲之聚斂而附益之).[32] Yan Shigu explains this section as being a criticism against those who disobey law and, as a result, accumulate private interests.[33]

20 Although these documents are only indirect testimonies on Zheng Xuan's commentaries in chapters and verses on laws, they are likely to reflect the kind of reasoning Chinese jurists carried out at that time. Their main purpose was to clarify the meaning of laws, a goal they reached by resorting to both historical evidence and the Classics: the former provided the institutional context while the latter guaranteed that these laws fit into the framework of the ideal government.

21 In addition to "explanations on law," the most important part of this extant documentation consists of definitions of legal terms. These are scattered in commentaries to the Classics or in official dynastic histories. Firstly, we find general definitions of legal terms similar in form to those given by Xu Shen 許慎 (58–148) in his etymological dictionary *Shuowen* (說文). Xu Shen had mainly recourse to exegetical commentaries (*xungu* 訓詁) to clarify the meaning of specific terms, a technique of interpretation which was commonly used by Han scholars. For instance, Xu Shen defines "to receive bribes" (*shou qiu* 受賕), as "curving the law in return for a present" (*yi caiwu wangfa xiangxie ye* 以財物枉法相謝也).[34] Yan Shigu quotes a very similar definition in a comment of the notion of *qiu* 賕 he made in the *Book of the Han*.[35] Xu Shen's definition obviously clarifies the meaning of the Han statute punishing the one "who receives a bribe in order to curve the law" (*shouqiu yi wangfa* 受賕以枉法) to the same sentence as those condemned for theft.[36] Similarly, Zheng Xuan provides general definitions of legal terms recorded in the Classics. For instance, in the *Rites of Zhou*, he glosses "ordinance" (*ling* 令) as "order" (*ling you ming ye* 令猶命也).[37]

22 In other passages, Zheng Xuan refers to a law to illustrate the section of a text in context. For instance, he paralleled the section of the *Rites of Zhou* indicating that the Treasurer for Market Taxes (*quan fu* 泉府) was in charge of fixing the interest rate for loans contracted by commoners according to the state's needs with Wang Mang 王莽 (r. 9–23 AD)'s economic policy aiming to conform to Confucius's teachings by fixing a maximum legal interest rate.[38]

23 We find several similar examples in which Zheng Xuan relies on current laws to explain a term in the Classics. For instance, a passage of the *Book of the Han* mentions that the prime minister Liu Qumao 劉屈氂 was sentenced to be cut in two at the waist (*yaozhan* 要斬) and his wife's head was to be severed and exposed on the marketplace (*xiaoshou* 梟首), for they were involved in a witchcraft scandal that occurred at the end of the reign of the emperor Wu. The text was followed by a commentary from Zheng Xuan on

this provision, which provides information about the legal context of Liu Qumao's punishment. According to Zheng Xuan, a husband whose wife practises black magic (*wu gu* 巫蠱) is jointly held liable and sentenced to be cut in two at the waist (妻作巫蠱，夫從坐，但要斬也).[39]

24 In total, we have records of three different Zheng Xuan commentaries on the character *gu* 蠱. In the *Book of Rites*, he mentions black magic as an illustration of "deviation" or "heterodoxy" (*zuodao* 左道), suggesting the political implication of such facts sentenced to the death.[40] Although we know that during the Han period the character *gu* clearly referred to black magic, and was intended to both harm an enemy and to acquire his wealth, it is unclear what kind of magical practice was specifically targeted.[41] It could be that law evolved and at some point encompassed several situations. In the *Book of the Han*, we find mentions of the use of human images to cast spells, even though black magic is also associated with the "*gu* poison" (*gu du* 蠱毒) made of insects and reptiles.[42] In the Tang Code, the practice of *ku* was more univocally identified with the confection of insect poison.[43] The existence of a Han law suppressing the practice of *ku* is confirmed in the index of the articles contained in the Han statute on assault (*zei lü* 賊律), recorded on the wooden board number 29 discovered on the Gurenti 古人堤 site, Hunan Province.[44] Documents unearthed on this site are dated from the end of the first century A.D. and reflect Eastern Han law several decades before Zheng Xuan wrote his commentaries. It is likely that Zheng Xuan refers to this law in a commentary on the *Rites of Zhou* in which he states that, according to the statute on assault, the one practising *ku* on somebody else, as well as the person who commanded him to act as such, were both to be executed on the marketplace (敢蠱人及教令者，棄市).[45] The punishments described in the three commentaries are slightly different, and Zheng Xuan may have referred to similar, yet diverse, situations. Notwithstanding their limits, these documents inform us about the closeness in form and content between gloss on law and other commentaries.

25 Extant documentation discloses only one aspect of Zheng Xuan's study on law. His commentaries in chapters and verses on laws are almost completely lost, and we can mostly rely only on fragments excerpted from commentaries he wrote on the Classics. These texts are not legal commentaries *per se*, they were designed to clarify and unify the interpretation of the Classics. They thus are not symmetric to commentaries on law and cannot be used to directly deduct their content. However, quotations excerpted from the Classics and official dynastic histories show that Zheng Xuan was learned in law. They are also useful to observe interactions between law and other areas of knowledge. They are therefore informative about the identity of those sections of the Classics that were connected to law. Though we cannot ascertain the direct influence Zheng Xuan's commentaries in chapters and verses had on law at the end of the Han period, we better know how Tang jurists had recourse to his commentaries on the Classics to construe relations between ritual and legal orders.

Zheng Xuan's commentaries on law and their influence on the formation of Chinese imperial law

26 Zheng Xuan's commentaries were already esteemed outstanding when they were drafted. At the beginning of the Wei dynasty, in an effort to unify legal interpretation, emperor Ming of Wei 魏明帝 (r. 226-239) ordered judges to interpret the laws only

according to these commentaries. This decision suggests that Zheng Xuan's commentaries outweighed other scholars' works. This situation lasted until the beginning of the Jin dynasty, when the new sovereign considered it too partial to refer to only one source of interpretation and therefore ordered his minister to draft a new code of laws.[46] The influence of Zheng Xuan's work was also determined by the general context of the formation of Chinese law that followed the end of the Han dynasty. This period represents a watershed in the constitution of the intellectual framework which later underpinned Chinese law. As already seen above, the process of codification of Chinese law was streamlined by the intellectual apparatus Confucian scholars fixed all along their commentaries of the Classics. Chinese jurists relied to a large extent on this new orthodoxy to establish a comprehensive legal system. They mainly took inspiration in legal definitions as well as in the depiction of idealised administrative institutions of the Zhou dynasty as provided in commentaries of the Classics. Besides, Zheng Xuan's legal commentaries had a lingering influence on Chinese law due to the large diffusion of his works. Ming and Qing legal scholars continued quoting his definition when discussing basic concepts of Chinese law. Zheng Xuan's commentaries were cited among others, as a link in a chain of legal works starting from antiquity.

27 It is nevertheless almost impossible to determine whether Zheng Xuan's commentaries had a direct influence on Chinese law and the extent to which his commentaries were accepted as a standard when interpreting legal categories. Such an issue is mostly due to the shortcomings of the materials available. In comparison to the laws enacted at the beginning of the Han dynasty, we have a rather superficial understanding of late Han legislation. Moreover, as mentioned above, the larger part of the legal commentaries written at that time have been lost.

28 In fact, what we are able to reconstruct today is rather the general picture of the interactions between law and commentaries to the Classics than a precise description of the specific contributions Zheng Xuan and other scholars may have made to the evolution of law. In addition, given that all the codes promulgated between the Han and the Tang dynasties are lost, we can only infer potential influence from the study of the Tang Code. We have seen in the preceding section of this paper that Tang jurists occasionally relied on the Classics and their commentaries to interpret legal provisions of the Tang Code. For several of these occurrences, they explicitly refer to Zheng Xuan's work.

29 For instance, under statute 5 of the Tang Code, death penalty is defined as the extreme punishment, the one for which a part of the soul returns to heaven (*hun* 魂) and another to earth (*po* 魄), before the deceased eventually merges with all the creation. The text is followed by a Zheng Xuan commentary to the *Book of Rites* associating the death penalty with the notion of exhaustion (*si* 澌).[47] This definition does not have any legal implication and is mostly informative about the intellectual context of the provision.

30 Another example shows a more direct influence of Zheng Xuan on the content of law. The Eight Deliberations (*ba yi* 八議) is a legal institution, which granted judicial privileges to several categories of persons in the Tang Code. These persons, including members of the imperial family or high-ranked officials, could not be prosecuted without the previous authorisation of the emperor.[48] No such institution existed in the early Han dynasty. It was probably introduced in Chinese law during the Western Han dynasty. The institution took its inspiration from the Eight Rules (*ba pi* 八辟) recorded

in the *Rites of Zhou*. Although we have little information about the actual function of the Eight Rules under the Zhou, they were later considered a mark of the correspondence between social status and punishments in Zhou society. The institution is generally considered to have been codified during the Cao-Wei dynasty, although several texts suggest that its inception must be dated from the Eastern Han.[49] In his commentary to the *Rites of Zhou*, Zheng Xuan quotes a gloss of Zheng Sinong, which associated the "rule for the morally worthy" (*yi xian zhi pi* 議賢之辟) with the obligation to first send a memorial when a member of the imperial house committed a crime.[50] This obligation is similar to the rule of the Tang Code, which compels officials to submit a memorial each time a person deserving one of the Eight Deliberations committed a capital crime.[51] Even though we do not know if the institution of the Eight Deliberations was as formalised in the Eastern Han law as it later became in the Tang Code, we can trace from Han times a process leading to the creation of this legal mechanism. And this process took as model an institution described in the Classics.

31 The study of the commentaries inserted in the Tang Code also demonstrates the pervasive influence of Zheng Xuan on the interpretation of this institution. The Eight Deliberations are justified upon a famous interpretation of the *Rites of Zhou* stating that "Punishments do not extend up to the great officers" (*xing bu shang daifu* 刑不上大夫). Then, the Tang Code extensively quotes Zheng Xuan's commentary to this passage: "If they commit offences, they are judged under the Eight Deliberations, and the weight of the sentence is not governed by the books of punishment." (犯法則在八議，輕重不在刑書也). Likewise, several commentaries defining each of the Eight Deliberations and the corresponding terms in the *Rites of Zhou* are relatively similar. In the Tang Code and its commentaries, the "deliberation for the morally worthy" (*yi xian* 議賢) is defined as the category of persons "whose conduct is greatly virtuous" (*you da de xing* 有大德行). This is a rewording of Zheng Xuan's commentary to the *Rites of Zhou*, in which he glosses morally worthy as a "virtuous conduct" (*xian you dexing* 賢有德行).[52] Likewise, the "deliberation for achievement" (*yi gong* 議功) is defined as "those of great achievement and glory" (*you da gongxun* 有大功勳) in the Tang Code and glossed as "great achievement and to accomplish great merit" (*you da xunli ligong* 有大勳力立功). Although not all the definitions were similar, it is clear that some commentaries in the Tang Code took their inspiration in Zheng Xuan's commentaries. This similarity might be indicative of the influence Zheng Xuan had on the codification of the Eight Deliberations.

32 Zheng Xuan's contribution to the definition of criminal intention is another achievement for which he is often praised in legal treatises. In the Zhangjiashan legal documents, which reflect the law implemented at the beginning of the Han dynasty, intent was not as clearly defined as it was in the Tang Code. It was nonetheless taken into account for the determination of the criminal responsibility. The term *zei* 賊, often associated with homicide (*sha* 殺) had a very broad meaning, encompassing notions of harmful intent, malice and intent to do a wrongful act. Killing with malice, as well as killing in affrays (*dou sha ren* 鬬殺人) and plotting to kill (*mousha* 謀殺) were punished by death, which blurred the distinction between these legal categories. Someone killing during a game (*xi sha* 戲殺) or killing by mistake or by negligence (*guoshi sharen* 過失殺人) was authorised to redeem the death with money.[53] These categories also existed in the Tang Code, in which punishments were, however, graded more precisely in consideration of the nature of the homicide. Moreover, the code and its commentaries

display clear definitions of these different categories of homicide. For instance, in the Tang Code, killing by negligence meant "wherein eyes and ears could not perceive and where thought and planning could not prevent" (*er mu suo bu ji, si lü suo bu dao* 耳目所不及，思慮所不到). The code further provides several examples of homicide by negligence. It could be a man not being able by himself to support a heavy weight that he lifted together with another person (*gong ju zhongwu, li suo bu zhi* 共舉重物，力所不制); losing his foot while climbing to a dangerous height (*cheng gao lü wei zu die* 乘高履危足跌); killing or wounding someone while hunting birds or animals (*yin ji qinshou, yizhi shashang* 因擊禽獸，以致殺傷). Killing in an affray refers to situations where originally there is no intent to kill and was therefore sentenced to strangulation, a degree lesser to the punishment perpetrators of killing with intent (*gu sha* 故殺) were subject to.[54]

33 These definitions were fixed through a long-term process to which Zheng Xuan contributed. Although there are differences between Zheng Xuan's definitions and those who were later codified in the Tang Code, we can observe a common understanding between Zheng Xuan and Tang jurists on the notion of "fault" or "negligence" (*guoshi* 過失). Zheng Xuan emphasises the absence of intent, which justifies a punishment more lenient than in situations in which a criminal acts out of intent to harm the victim: "When the intention to harm is remote, it has to be treated lightly" (*qu shanghai zhi xin yuan, shi yi qing zhi* 去傷害之心遠，是以輕之).[55] Zheng Xuan also mentioned that in the law on killing by negligence, no one was sentenced to death. He then illustrated the notion with the following example: "negligence, such as raising a blade to cut [grass or trees] and due to excess use hitting someone" (*ju ren yu zhuo fa, er yi zhong ren* 舉刃欲斫伐，而軼中人).[56] In Zheng Xuan's definition, the situation is less predictable than in those exemplifying the legal provision in the Tang Code. Although both Zheng Xuan and Tang jurists had recourse to concrete situations to delimit the framework of a legal category, the Tang Code also provides a general definition that is lacking in the Han scholar's work. Several decades after Zheng Xuan's death, Zhang Fei 張斐, considered as one of the most prominent jurists of the Jin dynasty, elaborated a more abstract understanding of the notion of intention. Zhang Fei distinguished between negligence (*guoshi* 過失), defined as "inadvertently offending without intention" (*bu yi wu fan* 不意誤犯) and intent (*gu* 故), when someone knows and offends (*qi zhi er fan* 其知而犯).[57] By contrast, Zheng Xuan defined negligence together with inattention (*yiwang* 遺忘) and ignorance (*bushi* 不識), the three categories for which a person liable to the death penalty was exempted from that punishment due to the existence of mitigating circumstances (*san you* 三宥). This classification, which appears only in the *Rites of Zhou*, was never codified in Chinese law, in which only negligence was consecrated as a legal category. Although Zheng Xuan's definition of criminal intention did not have a long-term influence on Chinese law, it remains a landmark attempt to clarify legal categories.

Conclusion

34 Zheng Xuan, who is mostly recognised for his contribution to the construction of the Confucian corpus, also undoubtedly played an important role in the formation of Chinese law. Given that many legal documents of this time are lost, it is difficult to determine his contribution with certainty. According to Chinese standard histories, he

wrote several commentaries to the Han law, whose authority was officially acknowledged by an imperial decision. However, since neither law in force at that time, nor Zheng Xuan's commentaries on law came down to us, we cannot assess the exact influence he had on Eastern Han law. Actually, we know Zheng Xuan's work on law mostly through his commentaries to the Classics, some sections of which are dedicated to the study of law. This documentation was used by legal scholars of later periods as a source of information on Western Han law, which ensured Zheng Xuan to be cited among prominent Chinese jurists. As a consequence of the Tang Code being framed according to the tenets of the Classics, Zheng Xuan's commentaries to the Classics were a source of inspiration for the generations of legal scholars who contributed to the development of Chinese codes.

35 From this perspective, Zheng Xuan's influence was twofold. Firstly, he largely contributed to shaping the orthodox interpretation of the Classics through his commentaries. Secondly, several of his definitions were quoted in the Tang Code, several of which having direct legal effect. Meanwhile, it is not necessary to overstate Zheng Xuan's influence on Chinese law. He was not a jurist, did not draft codes, and, as we have seen, some of his definitions on legal terms were not consecrated in law. Zheng Xuan's contribution is a link, yet important, in a chain of works that linked the ritual and legal spheres.

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FOOTNOTES

1. For a biography on Zheng Xuan, see Knechtges 2014.
2. Shen 1912. See also Xue 1982.
3. The compilation of laws into one single corpus is a process which is considered to have begun with the promulgation of the *Wei lü* 魏律 in AD 229. On the legislative process at the beginning of the Cao-Wei dynasty, see Qiao 1999, 21-22.
4. On the process leading to the elaboration of this corpus, see Nylan 2001, 1-59.
5. Despite statements we find in Tang historians' works, the first Chinese codes were not promulgated during the Warring States period, but more probably appeared after the end of the Han dynasty. As it has been convincingly stated in several studies, Tang historians created a genealogy of codes going back to the *Canons of Law* (*Fajing* 法經) of Li Kui 李悝, then Minister of the kingdom of Wei 魏, in order to legitimise their own code, which was then consecrated as the successor to an ancient tradition, see Ogawa 1933.
6. For a presentation and translation of these materials, see Hulsewé 1985; and Barbieri-Low and Yates 2015.
7. Several editions of the Tang Code were successively promulgated. The most important version, which was later diffused in East Asia and Viet Nam is the one promulgated in 653 with its commentaries (*Tang lü shuyi* 唐律疏議). We know the Tang code through a later edition of 737. For a translation in English of this text, see Johnson 1979 and 1997.
8. The expression "Confucianisation of law" was coined in Ch'ü 1961, 363-380. For a recent reappraisal of the concept, see Goldin 2012.
9. Schaberg 2010.
10. Queen 1996, 163-181. See also Huang 2009, 31-97.
11. Chen 1962, *juan* 21, 611.
12. Barbieri-Low and Yates 2015, 180-182.
13. Zheng Xuan 鄭玄, *Zhouli zhushu* 周禮注疏, *juan* 35, in Ruan 1980, 878.
14. Liu 1975, *juan* 50, 2141.
15. Liu 2012 and Liu 2005, 75.
16. Tang Code, art. 327. According to Johnson's translation, Johnson 1997, vol. II, 362.
17. Constant 2017.
18. Lai 2003.
19. Ebrey 1991, 18-19.
20. Chen 2015.
21. Tang Code, art. 143. According to Johnson's translation. Johnson 1997, vol. II, 116.
22. Zheng Xuan 鄭玄, *Liji zhengyi* 禮記正義, *juan* 34, in Ruan 1980, 1507. This passage is mentioned in a commentary to statute 315 of the Tang Code.
23. Liu 2012, 177-199.
24. Tang Code, art. 331. Johnson 1997, vol. II, 369-370.

25. Zheng Xuan 鄭玄, *Yili zhushu* 儀禮注疏, in Ruan 1980, 1104.
26. See Long 2012, 53.
27. Fang 1997, *juan* 30, 923. Ma Rong is credited with the redaction of the *Lüben zhangju* 律本章句. Ban 1964, *juan* 48, 1613.
28. Cheng 1927, *juan* 8, 18.
29. Zhang Yan 張晏 was a contemporary of Zheng Xuan whose life is not documented in historical materials.
30. Ban 1964, *juan* 14, 395-396.
31. On archaeological fragments on the law on regional lords, see Cao and Zhang 2010, 188-191.
32. Translation adapted from *Analects*, XI, 16, trans. Legge 1893, 242-243.
33. Ban 1964, *juan* 14, 396.
34. Duan 1981, 6B/21a, 282.
35. Ban 1964, *juan* 15, 449.
36. See Peng, Chen and Kudō 2007, 113-114.
37. Zheng Xuan, *Zhouli zhushu*, *juan* 29, in Ruan 1980, 835.
38. Zheng Xuan, *Zhouli zhushu*, *juan* 15, in Ruan 1980, 738. On Wang Mang's economic reforms, see Dubs 1940.
39. Ban 1964, *juan* 6, 209-210.
40. Zheng Xuan, *Liji zhengyi*, *juan* 13, in Ruan 1980, 1344.
41. On a comparison between extant documents, see Mizuma 2003.
42. See Feng and Shryock 1935 and Ch'ü 1961, 222, note 100.
43. Tang Code, art. 262. Johnson 1997, vol. II, 262-263. In the same text, statute 264 specifically addressed the crime of black magic. See Johnson 1997, vol. II, 267.
44. The document has been edited in Hunan sheng wenwu kaogu yanjiusuo and Zhongguo wenwu yanjiusuo 2003, 79-80.
45. Zheng Xuan, *Zhouli zhushu, juan* 37, in Ruan 1980, 888.
46. Fang 1997, *juan* 30, 927.
47. Tang Code, art. 5. Johnson 1979, vol. I, 60. Zheng Xuan, *Liji zhengyi*, *juan* 7, in Ruan 1980, 1281.
48. Tang Code, art. 7. Johnson 1979, vol. I, 83-87.
49. Long 2012.
50. Zheng Xuan, *Zhouli zhushu*, *juan* 35, in Ruan 1980, 874.
51. Tang Code, art. 8., Johnson 1979, vol. I, 88.
52. Zheng Xuan, *Zhouli zhushu*, *juan* 35, in Ruan 1980, 874.
53. Barbieri-Low and Yates 2015, 237-240.
54. Tang Code, art. 306. Johnson 1997, vol. II, 331.
55. Zheng Xuan, *Yili zhushu*, *juan* 13, in Ruan 1980, 1011.
56. Zheng Xuan, *Zhouli zhushu*, in Ruan 1980, 880.
57. Fang 1997, *juan* 30, 928.

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